In the High Court of Judicature at Madras

Dated:22.02.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.597 OF 1997

1.Karuppayal
2.Subbanna Gounder
3.Palanichamy
4.Kaliappan
5.Muthusamy ..Appellants

vs

Arumugam ..Respondent

This second appeal is filed under Section 100 of C.P.C against the judgment and decree dated 10.1.1997 made in A.S.No.74 of 1995 on the file of the Court of Subordinate Judge, Gobichettipalayam confirming the decree and Judgment in O.S.No.252 of 1993 dated 31.8.1995 on the file of the Court of District Munsif, Sathyamangalam.

For Appellants : Mr.R.T.Doraisamy
For Respondent : Mr.N.Damodaran

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.74 of 1995 on the file of the Court of Subordinate Judge, Gobichettipalayam. The defendants, who have lost their defence before the Courts below, are the appellants herein.

2. The averments in the plaint for the purpose of deciding this appeal sans irrelevant particulars are as follows:
Survey Nos 277/2 and 277/5 originally belong to Annamalaigounder, the father of the plaintiff who died ten years ago in intestate. After the death of Annamalaigounder, his wife Masayal, and his sons plaintiff, Kumarasamy, Shanmugham were in possession and enjoyment of the above said properties. Kumarasamy as an eldest son was looking after the properties as a kartha of the family. The said Kumarasamy got employment in the Electricity Board some two years ago. After he joined in the Electricity Department, the plaintiff was managing the properties belonging to the Hindu Joint Family. The Patta in respect of the suit property stands in the name of the father of the plaintiff. The plaintiff is paying land tax

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to the suit properties. Survey Nos.277/2 and 277/5 in Pungampalli Village are Manavari dry lands belonging to the family of the plaintiff.

2a) The first defendant is the wife of the second defendant. D3 and D5 are the children of D1 and D2. Survey Nos.277/1,277/4, and 277/6 of Pungampalli Village are the surrounding properties of the suit survey Nos.277/2 and 277/5. Survey Nos. 277/1,277/4 and 277/6 belonged to D1 and D2. There is a cart track and pathway leads from Pungampalli-Karapadi Road to the lands of the plaintiff and the defendants as shown in the plaint plan and pathway marked as "AB" "ACD". The said cart track, leading from the said road to Survey No.277/1 belongs to the first defendant. The said cart track starts from Survey No.267 passes through the lands of the first defendant and ends in Survey No.277/1. During cultivation the plaintiff and his family members used to go to their lands at Survey Nos.277/2 and 277/5 only through the above said cart track and also through pathway shown as "AB" "ACD" in the rough plan. The plaintiff and his family members are using the cart track and the above said pathway continuously for the past more than 10 years.

2b)Since the defendants have obstructed the peaceful enjoyment of the cart track and the pathway by the plaintiff and his family members, the plaintiff's brother Kumarasamy had filed a suit in O.S.No.283/1990 against D1 and D2 for an order of permanent injunction restraining the defendants from enjoying the cart track and pathway leading to their lands in Survey Nos.277/2 and 277/5. A Commissioner was also appointed in the said suit and he has filed his report and plan. At the same time, as a counterblast, the first defendant has filed a suit in O.S.No.284 of 1990 for an order of permanent injunction against the plaintifif herein and his brothers. The said suit was ended in compromise between the parties and a compromise deed was also entered into between the parties to the said suit. Under the said deed of compromise dated 10.10.1990, the defendants have agreed in the presence of the panchayatars not to disturb the peaceful enjoyment of the cart track and the pathway in the suit Survey Number properties. Both the suits in O.S.No.283/1990 and 284/1990 were dismissed as settled out of Court on 13.12.1990 by the trial Court.

2c)Apart from the said pathway, there is no other pathway in existence in the suit survey number properties for the plaintiff and his family members to reach their properties in Survey Nos.277/2 and 277/5 from Pugampatti-Karapadi Road. As per the compromise entered into between the parties, the plaintiff and his family members have withdrawn the earlier civil suits but the defendants have refused to withdraw the criminal cases pending against the plaintiff and his family members.

2d) In the meantime, the first defendant has preferred a false complaint in the month of July 1992 against the plaintifif and his family members with Puliyampatti Police Station who have registered a Case under Crime No.131/1992. The Sessions Court also directed the plaintiff and his family members not to use the above said cart track and the pathway.

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Now to cause inconvenience to the plaintiff and his family members, the defendants have obstructed the pathway by placing thony bushes, at point "A" thereby preventing the the plaintiff and his family members to go to the point "C" through the said pathway. Further the defendants have also reduced the width of the pathway to an extent of five feet between the point "C" and "D" by ploughing the said pathway. Further the defendants have raised brinjal plants at point "AB" in the said pathway. The plaintiff and his family members were made an attempt to go to their land through the pathway on 21.7.1993, the defendants have wrongfully restrained the plaintiff from proceeding in the said pathway. Hence the suit.

3. The second defenant has filed a written statement which was adopted by the defendants 1 and 3 to 5 as follows:
The father of second defendant is Kaliappa Gounder and not Palani Gounder. The plaintiff has to prove that the suit property originally belonged to their father Annamalaigounder and that after his death, the plaintiff's brother Kumarasamy was managing the suit properties in Survey Nos.277/2 and 277/5 and that for the past two years, the plaintiff is managing the said properties. The plaintiff ought to have filed the suit in the capacity of the Manager of the family being a co sharer of the joint family. The plaintiff is not entitled to file the suit in his individual capacity. On this ground alone , the suit is liable to be dismissed.

3a) The relationship between the plaintiff and the defendants is admitted. The first defendant and the second defendant are not owning any land in Survey Nos 277/1, 277/4 and 277/6. The first defendant does not own any land in Survey No.277/1, 277/4 and 277/6. Only the second defendant is the owner of Survey Nos 277/1,277/4 and 277/6 and a portion in Survey No.277. The plaint plan does not depict the correct picture as it exists.

3b)In fact, there is no cart track or pathway in the suit land as shown in the plaint plan. The alleged cart track does not reach Survey No.277/1. The plaintiff and his family members are not using the cart track in Survey No.267 and also the pathway to reach their lands. The plaintiff and his family members never used the pathway as indicated in the rough sketch as "AB "ACD" for the past 100 years. The plaintiff's brother Kumarasamy filed O.S.No.283 of 1990 against the first and second defendants and on the same date, the first defendant has also filed another suit in O.S.No.284 of 1990 against the plaintiff and his brother for permanent injunction as they attempted forcibly form a cart track through the defendants land in Survey Nos.266/10,266/2,266/17 and 266/12. But subsequently, both the suits were ended in compromise.

3c) Later, in the absence of the second defendant, the first defendant was taken forcibly to Puliyampatti Police Station and was forced to affix her thumb impression in a blank paper. There was no agreement

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entered into between the plaintiff and the defendants on 10.10.1990 as alleged in the plaint in the presence of panchayatars. The agreement dated 10.10.1990 was concocted document for the purpose of this case. The second defendant is the real owner of Survey Nos.277/1,277/4 and 277/6 is the party to the said alleged agreement. In the said agreement will not bind the second defendant. Neither the plaintiff nor his family members ever used the alleged "AB "ACD" pathway in the suit survey number property and there was no agreement dated 10.10.1990 entered into between the plaintiff and the defendants.

3d) The first defendant has no right or title in respect of Survey Nos.277/1,277/4 and 277/6. The averments that there is no pathway to reach the plaintiff's land in Survey Nos.277/2 and 277/5 is not true. In fact, there is another north south pathway which proceeds from the Iyampalayam Village. The plaintiff and his family members are using the said pathway which reaches the plaintiff's land in Survey No.277/5.

3e) There was no compromise came into force. That is why the second defendant has not withdrawn the criminal cases. On 7.7.1992, the plaintiff and his brothers and other family members attempted to murder the second defendant, his wife and his son Kaliyappan and also inflicted grevious injuries with deadly weapons . A criminal case has been preferred by the first defendant against the plaintiff and his family members which was registered under Crime No.131/1992 of Punjaipuliyampatti Police Station. The said case is also pending.

3f) The second defendant is cultivating his land in Survey No.277/1 and has been enjoying the same. The second defendant has not caused any hindrance or obstruction to the plaintiff in using the suit pathway. Neither the plaintiff nor his family members have any right of easement of usage of the said pathway. Hence the suit is liable to be dismissed.

4. On the above pleadings, the learned trial Judge has framed three issues and one additional issue for trial. The plaintifif has examined himself as P.W.1 besides examining P.Ws 2 and 3 and Exs A1 to A15 were marked. On the side of the defendants, second defendant has examined himself as D.W.1 and one Kaliyappa gounder was examined as D.W.2. Exs B1 to B3 were marked. A Commissioner was appointed to note down the physical features of the suit properties and Commissioner has filed his report Ex C1 and plan Ex C2.

5. After careful consideration of both oral and documentary evidence, the learned trial Judge has decreed the suit as prayed for with costs. Aggrieved by the Judgement of the learned trial Judge, the defendants have preferred an appeal in A.S.No.74 of 1995 before the Subordinate Judge, Gobichettipalayam, after considering the rival claims of the parties, the learned first appellate Judge has dismissed the appeal thereby confirming the decree and judgment of the learned trial Judge. Hence the second appeal by the defendants.

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6. The substantial questions of law involved in this appeal are

" 1. When the Commissioner stated in his report that there is an alternative pathway to the plaintiff's land, whether the Court below is corrrect in holding that there is no alternative pathway to the plaintiff's land?

2. Whether the lower appellate Court, after having found that Exs A4 to A6 on which the plaintiff filed the suit, are not true, erred in dismissing the appeal?

7. Heard Mr.R.T.Doraisamy, learned counsel appearing for the appellants and Mr.N.Damodaran, learned counsel appearing for the respondent and considered their respective submissions.

8.The Points:

The suit is for declaration and injunction in respect of the cart track and the pathway shown as "AB"ACD" in suit survey No.277/1 inEX C2 plan. Admittedly survey No.277/1 belonged to the second defendant/second appellant. The learned counsel appearing for the appellants would contend that there is an alternative pathway available for the plaintiff and his family members to reach their lands in survey No.277/2 and 277/5. But to substantiate this contention, they would rely only on the observation made by the learned Advocate Commissioner in Ex C1 report. During the visit of the learned Advocate Commissioner to the plaint schedule property, the learned Commissioner has stated in Ex C1 report that the learned counsel for the defendants has shown some of the foot steps behind the lands of the defendants. But the learned counsel for the plaintiff has pointed out to the Commissioner that the said footsteps are leading towards the land of the third party but it does not lead to the land of the plaintiff. The learned Advocate Commissioner has categorically stated in his report Ex C1 that there are some footsteps behind the lands of the defendants but it cannot be said that is an alternative pathway to the existing pathway "AB"ACD". Under such circumstances, the contention of the learned counsel appearing for the appellants that there is another pathway available to the plaintiff to reach his land false to the ground.

9. Admittedly, the plaintiff's land in Survey Nos.277/2 and 277/5 are being surrounded by the lands of the defendants in Survey Nos.277/1,277/4, 277/6 and 277/7. The Commissioner has marked the existing cart track and the pathway in his plan Ex C2 which reveals that the cart track is leading from Pugampatti-Karapadi Road towards east and it stops at Point"A" to Ex C2 Commissioner's plan and thereafter from point "A" a pathway is leading to Survey No.277/5, through the land belonging to the plaintiff in Survey No.277/1 belongs to the second defendant. From Ex C2 plan, it is clear that there is no pathway is available for the plaintiff and his family members to reach their lands in Survey No.277/5 except through the pathway "AB "ACD" but Survey No.277/2 which is situated just adjacent to the cart track, the plaintiff and his family members have to

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go through the pathway "AB" as shown in the rough sketch. Even though the Commissioner has marked the points "A B", he has not shown any pathway by indicating with "X" mark whereas he has indicated with "X" mark "ACD pathway leading to Survey No.277/5. But the Commissioner has marked the points "AB" in his plan Ex C2. Since there is no evidence on record on the side of the appellants to show that there is an alternative pathway available for the plaintiff and his family members to reach their lands in Survey Nos.277/2 and 277/5 except the cart track and the pathway shown by the Commissioner in his plan Ex C2 as "AB"ACD", both the Courts below have concurrently held that the plaintiff is entitled to an order of injunction restraining the defendants from using the only pathway leading to their lands as shown in the Commissioner's plan Ex C2 as indicated above.

10. Under such circumstances, I do not find any reason to interfere with the well considered Judgment of the first appellate Judge in A.S.No.74 of 1995 on the file of the Court of Subordinate Judge, Gobichettipalayam which is neither infirm nor illegal to warrant any interference from this Court. Points are answered accordingly.

11. In fine, the appeal is dismissed and the decree and judgment in A.S.No.74 of 1995 on the file of the Court of Subordinate Judge, Gobichettipalayam with costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

sg

To

1. The Subordinate Judge, Gobichettipalayam.

2. The District Munsif, Sathyamangalam.

3. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.R.T.Doraisamy, Advocate, SR.10885.
1 cc To M/S.N.Damodaran, Advocate, SR.10816.

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